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In The

Supreme Court of the United States

October Term, 1996

JOHANNA TREVINO, a minor,

Petitioner,

v.

DARYL GATES, TOM BRADLEY, HERBERT BOECKMANN, JERRY BROOKS, JOSEPH CALLIAN, MICHAEL SIRK, RICHARD SPELMAN, GARY STRICKLAND, JAMES TIPPINGS, RICHARD ZIERENBERG, MANUEL AVILA, CHARLES BENNETT, BRIAN DAVIS, JOHN FRUGE, JOSEPH FREIA, EDWARD GUIZA, PETER SANCHEZ, REGINALD WEAVER, JAMES TOMA, C.S. WINSTON, PHILIP WIXON, GARY ZERBEY, JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVKSY, RUTH GALANTER, ERNANI BERNARDI, NATE HOLDEN, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES, CITY OF LOS ANGELES, all in both their individual and official capacities; and CITY OF LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public entity other than a state indemnify police for punitive damages awarded in federal civil rights actions without undermining the deterrent purpose of 42 U.S.C. § 1983 (1982)?

2. May a local government decision to pay punitive damages for its police serve as a basis to impose Section 1983 liability against the government and its officials, based on a theory of ratification or custom?

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PETITION FOR WRIT OF CERTIORARI

Johanna Trevino, a minor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 99 F.3d 911 (9th Cir. 1996) (App. A, 1a-30a).

Previously, this case came before this Court on respondent Los Angeles city council members' Petition for Certiorari to review the Ninth Circuit's denial of their claim of absolute immunity. *Trevino v. Gates*, 23 F.3d 1480 (9th Cir.), *cert. denied sub nom. Wachs v. Trevino*, 115 S.Ct. 32 (1994). *See also, Trevino v. Gates*, 798 F.Supp. 621 (C.D. Cal. 1992); 888 F.Supp. 1509 (C.D. Cal. 1995), *aff'd in part, rev'd in part*, 99 F.3d 911.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1996, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Ku Klux Klan Act of April 20, 1871, as amended, 42 U.S.C. § 1983 (1982), provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Government Code (West 1996) Section 825(b) provides, in pertinent part, as follows:

> Notwithstanding . . . any other provision of law, a public entity, other than the state . . . is authorized to pay that part of a judgment that is for punitive damages if the governing body of that public entity, acting in its sole discretion, finds all of the following. . . . [The judgment is against an employee who acted within the course and scope of employment and in good faith, without actual malice, and in the apparent best interests of the public entity.][1]

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[1] Typically, a city attorney who defended the losing police at trial makes the case to the city council that the jury reached a wrong verdict, and that the city council should make the finding required by this Section and indemnify the officer for punitive damages. The inherent, serious ethical conflict of interest presented by this dual legal representation has resulted in indemnification of punitive damages for Los Angeles police officers in nearly 40 cases – virtually every one that has come before the Los Angeles city council.

STATEMENT

The State of California has made possible the abolition of payment of punitive damages by Los Angeles police in federal civil rights actions and certiorari should be granted to stop this state annulment of federal law.

Petitioner Johanna Trevino (Trevino), a six-year-old, was *in utero* on February 12, 1990 when eight members of the Los Angeles Police Department Special Investigations Section (S.I.S.), publicly and commonly known as a "death squad," trapped her unarmed father in the rear seat of an automobile and executed him with a *coup d' Jarnac,* by blowing off the back of his head with a shot from 18 inches away.

The members of this squad of about 20 officers: have admitted killing at least 19 persons in the last eight years; killed at least 28 persons in the last 14 years; and, wounded seriously at least 28 others in that same time period, all in shootings. Only one such person has, on post mortem examination, been found to have had a bullet entry wound any place other than in the rear of his or her body.

Trevino was born within the next week, and brought a federal civil rights action against respondents City of Los Angeles, Los Angeles' then-chief of police, Daryl Gates, the police who murdered her father, City council members who had voted to indemnify Gates and the police for punitive damages awarded against them in a prior action based on the same conduct by both Gates and the same police, and various Los Angeles city officials.

Relatives of two other men whom the same police murdered at the same time, as well as Trevino's grandmother, and the one man in the car who was shot and seriously wounded but who survived, previously had brought and prevailed in an action against Gates and the death squad members, *see Gomez v. Gates*, 804 F. Supp. 69 (C.D. Cal. 1992), and it was held that Trevino was entitled to prevail at her trial on the issues of liability and the amount of punitive damages based on *res judicata*. Her case was tried only on the issue of compensatory or nominal damages, and pursuant to the district court's pre-trial, *res judicata* finding on the amount of punitive damages, respondent City of Los Angeles paid those damages for respondents Gates and police officers, as they had done in *Gomez*.

Trevino contended that liability could be imposed against respondents City and its council members on the ground that they ratified the police malicious and oppressive conduct (which were the bases for the awards of punitive damages in *Gomez, supra*) by voting and agreeing to pay the punitive damages awarded against Gates and the police in *Gomez*. The court below held, based on its opinion in *Cornwell v. City of Riverside*, 896 F.2d 398, 399 (9th Cir.), *cert. denied*, 497 U.S. 1026 (1990) (municipality's payment of punitive damages to indemnify its police does not violate federal law), that indemnification of punitive damages could not serve as a basis for imposition of Section 1983 liability based on a theory of ratification. In *Cornwell*, the plaintiff contended that indemnification of punitive damages was impermissible. Trevino claims that indemnification of punitive damages properly may be a basis for imposition of Section 1983

liability, based on a theory of ratification of unconstitutional conduct that has been found to be malicious or oppressive.

The court below dismissed Trevino's ratification claim by holding that "the City Council in this case was not deciding whether to approve the officers' conduct; it was debating whether or not to compensate victims of the constitutional deprivation[,] . . . [and therefore,] the Council members' vote to pay punitive damages does not amount to ratification." Slip op. at 14447. This is incorrect as a matter of law, because Section 1983 punitive damages do not compensate, rather they are intended to deter unconstitutional conduct. It dismissed Trevino's claim by holding that "[w]ere we to find ratification, our holding would fly in the face of *Cornwell* by indirectly finding that a municipality's payment of punitive damages under Cal. Govt. Code § 825(b) violates federal law." *Ibid.*

The court below decided the issue of whether or not voting to indemnify for punitive damages was either a vote to "compensate victims of the constitutional deprivation," as respondents claimed, or a vote to "approve the officers' conduct," as petitioner claimed, in respondents' favor, and foreclosed determination of the legal issue in petitioner's favor by relying on *Cornwell.*

It was for a jury to determine whether the vote to indemnify was a vote to compensate victims or a vote of approval of unconstitutional conduct. Because Section 1983 has *both* compensation and deterrence purposes, it also was for a jury to determine if the former purpose was the only purpose behind the vote to indemnify. If, as a matter of fact, the vote to indemnify was a vote to ratify

unconstitutional conduct, then, absent *Cornwell,* petitioner had a viable claim against respondents City and its council members. Because the facts were in dispute as to the purpose of the vote to indemnify for punitive damages, and because *Cornwell's* license to indemnify police who act maliciously, oppressively, and in disregard of constitutional rights, vitiates completely the deterrence function of Section 1983, this Court should grant certiorari to repudiate the *Cornwell-Trevino* rule.

REASONS FOR GRANTING THE PETITION

The reasons for granting the Petition are:

1. There has been a faulty construction of federal law, in which a state statute has been permitted to override the clear purposes of federal law, and this anomaly will affect numerous civil rights cases;

2. Public officials have used methods which are alien to our American system of justice, and will be permitted to escape the consequences of their bad conduct;

3. The opinion below is at odds with the rationale and previous assumptions upon which this Court has approved imposition of punitive damages, and will operate to cause serious unwanted and unwarranted results; and,

4. The issue affects federal civil rights actions in numerous states.

It is contrary to the recognized deterrence purpose of the civil rights laws to permit local government entities to pay punitive damages assessed against police officers.

Punitive damages " 'are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' " *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 [1974] [footnote omitted]). Punitive damages, the United States has argued, fulfill a "jury's need to punish and deter . . . reprehensible conduct. . . . " *O'Gilvie v. United States*, 95-966 (December 10, 1966) (quotation inverted). A local government's indemnification of punitive damages for police who maliciously and oppresively violate the Constitution defeats entirely both the purpose and the function of punitive damages.

> Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a *deterrent* against future constitutional deprivations, as well. Liability for . . . injurious conduct [is] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen v. City of Independence, 445 U.S. 622, 651-52 (1980) (emphasis added). The court of appeals' decision is contrary to the deterrent purpose of Section 1983.

The purpose of punitive damages is very clear:

> to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (West 1996), Section 85.11.

In refusing to permit a civil rights plaintiff to recover punitive damages from a local government, over the objection of that government, this Court made very clear the purposes that underlie punitive damages in federal civil rights actions.

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 259-71 (1980), made clear that:

> [T]he 1871 [Civil Rights] Act was designed to *expose* state and local officials to a new form of liability [and it] would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of Section 1983. [Citations omitted.] Only after careful inquiry into considerations of both history and policy has the Court construed Section 1983 to incorporate a particular immunity defense.[2] *[T]he officials' malice [for purposes of*

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[2] Indeed, only those immunities that historically existed at the time the Civil Rights Act became law in 1871 have been applied by the courts as immunities in Section 1983 actions, and it long has been the case that "[s]tate statutory immunity provisions do not apply to federal civil rights actions." *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir. 1984). As this Court has held, to construe a federal statute to allow a state immunity "to have controlling effect would transmute a basic guarantee into an illusory promise," which the Supremacy Clause does not permit. *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980). In *Guillory*, the Ninth Circuit refused to permit California to set up California Government Code Sections 820.2 and 821.2 as immunity defenses in a civil rights action. 731 F. 2d at 1382. The holding in *Guillory* should have dictated a different

> *punitive damages] should not be attributed to the taxpaying citizens of the community.* . . . "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent." [259-61.]
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> . . .
>
> ("The [municipal] corporation can not, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs"). In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment. . . . [262-64.] [W]e examine the objectives underlying punitive damages in general, and their relationship to the goals of Section 1983. Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct. . . . [I]t remains true that an award of punitive damages against a municipality "punishes" only taxpayers, who took no part in the commission of the tort. [266-67.]

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result by the Ninth Circuit in *Cornwell*, as should have this Court's *Martinez* decision.

[The] retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. . . . Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

. . .

[D]eterrence of future abuses of power by persons acting under color of state law is an important purpose of Section 1983. . . . [T]he deterrence rationale of Section 1983 does not justify making punitive damages available against municipalities. [268-69.] [T]here is a more effective means of deterrence [than assessing punitive damages against governmental entities]. *By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations.* In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations. . . . The Court previously has found, with respect to such violations, that *a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a governmental employer.* [Citation omitted.] *We see no reason to depart from that conclusion here, especially since the imposition of additional penalties would most likely fall upon the citizen-taxpayer.*

To add the burden of exposure for malicious conduct of individual government employees

> may create a serious risk to the financial integrity of these governmental entities. [270-71.]

(Emphases added).

This Court unequivocally declared that the malice of individual government officials "should not be attributed to the taxpaying citizens of the community" and that a municipality cannot "be responsible for the malice of its officers." "Punishment properly [can be] applied only to the actual wrongdoers." "Retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers."

Yet, the State of California has accomplished precisely what this Court has forbidden: an attribution to the taxpaying citizens of the community of the malice of government officials. While California has the power to regulate attribution of punitive damages in *its* courts, it has no power to permit payment of punitive damages by its local governmental entities when such damages are assessed in a federal court. United States Constitution, art. VI (the Supremacy Clause). Apart from the federal constitutional bar to such state permissiveness, the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting. Moreover, traditional notions of punishment and responsibility do not permit the sort of burden-shifting permitted by California.

Of the 15 states and one United States territory who have legislated on the issue of whether or not a local governmental entity (or a state) may opt to indemnify government officials for punitive damages, nine states permit such indemnification, four states and one territory

prohibit it, one state permits legislation to permit it, and one state permits the purchase of liability insurance to provide such indemnification.

It is permitted in California (Cal. Govt. Code § 825[b] [West 1996]); Colorado (Colo. Rev. Stat. § 24-10-114, 24-10-118[5] [1996]); Maine (Me. Rev. Stat. Ann. tit. 14 § 8112 [1996]); Maryland (Md. Cts. and Jud. Proc. § 5-403 [1984]); Minnesota (Minn. Stat. § 466.07 [1996]); New Jersey (N.J. Rev. Stat. § 59:10-1 [1996] [state], 59:10-4 [political subdivisions]); New York, but only for police (N.Y. Gen. Mun. Law § 50-j [McKinney 1996] [enabling statute], 50-1 [requiring Nassau County to indemnify police], 50-m [same for Suffolk County], 50-n same for other police in Nassau County), and prohibits it otherwise (N.Y. Pub. Off. Law [West 1996] § 18); Ohio (Ohio Rev. Code Ann. § 9.87 [Baldwin 1996] [state], § 277.44.07 [political subdivisions]); and, Oklahoma (Okla. Stat. § 162 [1996]).

It is prohibited in Illinois to political subdivisions (Ill. Rev. Stat. ch. 745 § 10/2-302 [West 1996]); Kansas (Kan. Stat. Ann. § 75-6109 [1996]); North Dakota (N.D. Cent. § 32-12.1-03 [1996]); and, Virgin Islands (V.I. Code Ann. tit. 10 § 102 [1996]).

Nebraska permits it for state employees with the approval of the state legislature (Neb. Rev. Stat. § 81-8.239.05 [1996]); and, Iowa permits the purchase of insurance to provide indemnification (Iowa Code § 670.8 [1996]).

In January 1986, California's punitive damages burden-shifting law took effect. Cal. Govt. Code (West 1996) Section 825(b). That Section permits governmental entities in

California to pay judgments for punitive damages under certain prescribed circumstances, by making findings that employees acted within the course and scope of their duties, and acted in good faith. (Of course, such a finding of good faith would be completely at odds with any jury verdict in a federal civil rights action against government employees, whom a jury necessarily would have found *not* to have been in good faith by its rendering of a verdict against such employees; not to mention it being completely at odds with the necessary mixed factual/legal finding that is a predicate for an award of punitive damages: wantonness, malice, or oppression.)

The California statute should not have any effect whatsoever in this action. Section 1988 of Title 42 of the United States Code provides that:

> The jurisdiction in civil. . . . matters conferred on the district courts, by the provisions of this Title, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, *so far as the same is not inconsistent* with the Constitution and laws of the United States, shall be extended to and govern said courts. . . .

(Emphasis added.) Section 1988's first sentence puts into effect the principle of assimilation of laws, but limits the application of assimilation to laws consistent with federal law, pursuant to the mandate of the Supremacy Clause, *supra*. ("This Constitution, and the laws of the United

States which shall be made in pursuance thereof[ ] . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding.") The assimilative provisions of Section 1988 can have no application in instances in which state law is incompatible with, or contrary to, federal law, *Robertson v. Wegmann,* 436 U.S. 584 (1978), as here. In considering questions of inconsistency between federal law and state law for the purposes of assimilative use of state law under Section 1988, the policies underlying federal law must be considered and put into effect. State law may *not* be used assimilatively when such application would be inconsistent with the principles underlying federal law. *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984). For example, it has been held that conflicting California state law concerning an award of attorneys' fees may *not* be applied when such California state law is inconsistent with federal law. Section 1988 preempts application of conflicting California law when it is inconsistent with federal law. *La Raza Unida v. Volpe,* 545 F. Supp. 36 (D. Cal. 1982). The same should be true here.

The provisions of Government Code Section 825(b) are inconsistent with the federal common law of punitive damages, and therefore the provisions of that Section may not be invoked in this federal civil rights action to vouchsafe from potential liability government and government officials who make nugatory punitive damages awards in federal civil rights actions, and who defeat the deterrent purpose and function of Section 1983 punitive damages awards.

"Title 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is 'necessary to furnish suitable remedies' under § 1983." *Carey v. Piphus*, 435 U.S. 247, 258 n. 13 (1978). Federal courts are to turn to state law in order to fill gaps which may exist in federal law. *See Brazier v. Cherry*, 293 F.2d 401, 409 (5th Cir. 1961). When federal law is sufficient to carry the policies of the civil rights statutes into effect, resort to state law is not necessary. *Ibid.* "Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988. . . . " *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). *A fortiori*, so too are punitive damages governed by federal standards when they are awarded for deprivation of a *federal* right. "[R]esort to State law . . . should *not* be undertaken before principles of federal law are exhausted." *Wilson v. Garcia*, 471 U.S. 261, 268 (1985) (emphasis added).

Here, principles of federal law are not exhausted, and need not be exhausted, because the principles underlying federal law require that those against whom punitive damages are assessed must bear the burden of those damages.

Federal law allows the imposition of punitive damages even in cases in which such recovery may not be had under state law. *Smith v. Wade*, 461 U.S. 30 (1983). *A fortiori*, in cases in which state law attempts to make nugatory an award of punitive damages, *viz.*, California Government Code Section 825(b), federal law does not permit the assimilation of those state law provisions to thwart the impact of federal law.

A goal of assimilation of state law under Section 1988 is the achievement of uniformity of federal law. *Wilson, supra; Owens v. Okure,* 488 U.S. 235 (1989). It is wholly inconsistent with this Court's view of the application of state law through Section 1988 to permit assimilation of California's Section 825(b), because California thereby is permitted to have a *sui generis* rule that permits its government officials to escape the burdens of their misconduct, while government officials in other jurisdictions have to bear that burden. It is inconsistent with this Court's view that there be uniformity of application of the civil rights laws to permit respondents here to shelter themselves under Section 825(b).

The opinion below, based on reasons set forth in *Cornwell* that are demonstrably wholly inconsistent with federal law, brushes aside precedent, and *Cornwell's* admission of the "harmony between [Cornwell's] position and the [Supreme] Court's analysis of punitive damages[,]" 896 F.2d at 400, to reach the results-oriented conclusion that state law may operate to vouchsafe from the imposition of punitive damages miscreant police officers so that civil rights "plaintiff[s] would [not] have an extraordinary weapon with which to negotiate with individual defendants [in civil rights actions]," *ibid.*, is illogical. *Cornwell* is significantly flawed, for the following reasons. (Each initial quotation from the opinion is followed directly with the reasons it is flawed.)

1. "There is no doubt that the damages awardable under 42 U.S.C. § 1983 are a matter of federal law. California cannot set up a policy subversive of that law. . . . *City of Newport* does not establish a federal policy prohibiting a city from paying punitive damages. . . . [T]he city

is not bound by the jury's findings. . . . " 896 F.2d 398 at 399.

The City *should be* subject to liability based on a theory of ratification of bad conduct when it pays punitive damages for its police.

These statements are misguided. Cal. Govt. Sec. 825(b) *is* "subversive" of the federal law of punitive damages because it permits *federal* civil rights defendants not to pay them, and effectively abolishes them. Just as California law that would permit a designee to serve jail time upon conviction of a federal crime would be "subversive" of federal law, so too is Section 825(b) subversive of federal law because it is the opposite of the federal principle that "the wrongdoer himself . . . [should be] made to suffer for his unlawful conduct. . . . " 896 F.2d at 399. Though a local government entity is not bound by a jury finding of malice, etc., against one of its employees, the employee *qua* federal defendant against whom a federal jury has awarded punitive damages under federal law must be bound by that finding.

The Ninth Circuit's *Cornwell-Trevino* rule is subversive of federal law.

2. "We find no federal law prohibiting California cities from acting under the authority conferred by the California legislature. When Congress has wanted to prohibit payment of damages on behalf of one person by another it has known how to do so with express language." 896 F.2d at 400.

This, also, misses or avoids the point. Congress has not provided for punitive damages, because the common law of damages makes such provision. Thus, to hold that

only congressional action may prevent indemnification of punitive damages by the government misses the point that Congress does not need to do so because the common law has done so. Congress has not provided for innumerable matters that this Court regularly decides without the intervention of Congress.

3. "[A] prohibition on indemnification would be in harmony with [this] Court's analysis of punitive damages." *Ibid.*

This statement should have warranted the relief sought in *Cornwell* without more, because the common law, and not a federal statute, should control the outcome of this case.

4. "[That] there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay [punitive damages,]" *ibid.*, misses the point.

Cornwell did not ask the court to *bar* indemnification of punitive damages; but simply, as the court later divined, asked to permit a plaintiff who is awarded punitive damages, *to refuse to permit indemnification.* Such a plaintiff would be the *only* person with standing to do so, and if, in such a case that plaintiff went "unsatisfied," that would result only from his or her decision. The *Cornwell* court's "concern" here is unsupported *obiter dictum.*

The Ninth Circuit's refusal to follow the federal law of damages it admits is controlling, because to do so would give a civil rights plaintiff "an extraordinary weapon with which to negotiate with individual defendants[,]" *ibid.*, is beside the point.

The law must be the law, even if it is helpful to plaintiffs in civil rights cases. This is not "an additional remedy," *ibid.*, to civil rights plaintiffs – it is the law. Additionally, by enacting Section 825(b), California has arrogated to itself the power to provide "an additional defense" to civil rights defendants.[3]

The Ninth Circuit rendered faulty constructions of the federal law of punitive damages. A state statute was permitted to override and to preempt federal law, and the anomaly created by this construction affects every civil rights case in California. The *Cornwell-Trevino* rule is wholly at odds with, and contrary to, previous assumptions concerning the federal law of punitive damages, and will result in serious, unwanted results.

Rules on permissible sources of payment of Rule 11 sanctions provide support for Petitioner's position.

In *Pavelic & LeFlor v. Marvel*, 493 U.S. 120, 126-27 (1990) this Court held, directly contrary to *Cornwell*, as follows:

> [I]t is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home

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[3] *See* note 2, *supra*.

> to the individual signer his personal, nondelegable responsibility. It is at lease arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally – and not his law firm – to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally – and not his law firm – its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone,* is precisely the point of Rule 11.

As is the case with Rule 11 sanctions, so too should it be the case with punitive damages that, retribution should fall not on the taxpayers, but on the wrongdoer, because "[t]he message thereby conveyed [will be that the blame] is *yours alone. . . .* " To hold otherwise would make nugatory the purpose and effect of punitive damages.

This position is supported strongly by *Derechin v. State Univ. of New York,* 963 F.2d 513, 518-19 (2d Cir. 1992), and the cases cited therein.

Derechin resolved the issue of whether a federal court could prohibit indemnification by the State of New York of sanctions imposed against a New York State assistant attorney general under F.R. Civ. P. (West 1996) Rule 11.

The *Derechin* court's canvass of the relevant law led it to conclude that "federal courts have 'unquestioned authority' to impose a Rule 11 sanction on the lawyer rather than the client[,]" 963 F.2d at 518 (citations omitted), and that "[s]ome courts . . . have explicitly prohibited reimbursement of a Rule 11 sanction by the client. *See Borowski v. DePuy, Inc.,* 850 F.2d 297, 305 (7th Cir. 1988);

Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986); *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166, 168 (D. Colo. 1983); *see also, Farino v. Walshe*, 938 F.2d at 8 ('The Courts unquestioned authority to impose a Rule 11 sanction and to determine that the sanction should be borne by the lawyer and not the clients obviously included the authority to make the express terms of the sanction order effective')." *Ibid.*

Noting that this Court "made it clear that the 'central goal' of Rule 11 is deterrence[,] *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2454[,]" the court disposed of the reasoning that underlies the premise in this case, that indemnification of punitive damages furthers the goal of payment of damages by stating that this "Court recognized that the imposition of Rule 11 sanctions on the signing attorney's law firm would better guarantee reimbursement to litigants[,]" *ibid.*, but that indemnification defeated the *central* purposes of such sanctions, to wit, punishment and deterrence.

The court analogized the issue of indemnification of Rule 11 sanctions with indemnification of punitive damages, and found that "[e]ighteen states . . . have held that insurance policies covering punitive damages assessed directly on the defendant are void as a matter of public policy. *See* Richard L. Blatt, Robert W. Hammesfahr, and Lori S. Nugent, *Punitive Damages: A State by State Guide to Law and Practices* § 5.3 (1991). . . . " *Id.* at 519 (other citations omitted).

> [T]he major consideration supporting this rule is that the deterrent effect of punitive damages would be diluted if the defendant were allowed

> to pass on the burden of such damages to his insurer. In the leading case of *Northwest National Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), the Court held that punitive damages were not insurable under Florida and Virginia law. Judge Wisdom identified a number of societal interests advanced by the rule against insurability, notably that insurance against punitive damages weakened the deterrent effect of such awards. *Id.* at 441-42. In part on this ground, the public policy of many states prohibits insurance for punitive damages even though the proscription increases the risk that some claimants will not recover the full amount of their punitive damage award. *See id.* at 443, 444-45 (Gewin, J., concurring). The reasoning is persuasive in the instant case. The availability of insurance for Rule 11 sanctions might increase the possibility for full recovery of attorney's fees, but would weaken the deterrent effect of the sanction by allowing the sanctioned attorney to shift the burden of the sanction. Deterrence would be undermined if district courts could not impose Rule 11 sanctions without the possibility of indemnity – whether from a client, an employer, or an insurer.

Ibid.

The reasoning that supports the conclusion that federal courts necessarily must be permitted to impose Rule 11 sanctions and prohibit indemnification, supports even more strongly the proposition argued here that this Court must permit civil rights plaintiffs to refuse indemnification of punitive damages, and should prohibit in any circumstances such indemnification.

State statutes that permit indemnification of punitive damages do not merely "dilute" the deterrent effect of such damages; they destroy any deterrent effect. What is worse, they punish innocent taxpayers who have little if any knowledge of this phenomenon, who do not know when it occurs, and who have no realistic recourse to prevent it.

The sound idea that an insurer may not indemnify for punitive damages because to do so is against public policy, takes on significantly greater force in light of (1) the importance of the constitutional rights that are vindicated in federal civil rights actions vis-à-vis ordinary tort rights, (2) the fact that the tortfeasors in civil rights actions always are persons who engage in wrongdoing cloaked with the authority of the government, and (3) the fact that deterrence of violations of the Constitution and federal laws is vitiated by indemnification. The societal interests that weigh against indemnification of punitive damages in federal civil rights cases are great, indemnification serves no societal interest at all, and serves only the personal interests of miscreant police (who lobbied heavily, at least in California and in New York, for the indemnification statutes), and the politicians who seek to curry their favor.

Federal courts who have the power to prohibit indemnification of Rule 11 sanctions, have the power, and more reason, to prohibit indemnification of punitive damages in cases brought under a federal statute whose express purposes is deterrence, as compared to a mere rule of procedure, such as Rule 11. Indeed, the courts have a duty to do so to preserve the deterrent function of punitive damages in federal civil rights actions in states

who have subverted both Section 1983 and the federal common law of punitive damages by enacting indemnification statutes, such as California's Govt. Code § 825(b).

CONCLUSION

The Petition for Certiorari should be granted (1) to prevent California from continuing to pervert and to undermine the deterrent function of punitive damages awards under Section 1983, and, (2) to protect innocent taxpayers from bearing the burden of "officials' malice [that] should not be attributed to the taxpaying citizens of the community. . . . " *City of Newport, supra,* 453 U.S. at 261.

As this Court said in *City of Newport:* "[t]hese [punitive damages] . . . can never be allowed against the innocent. . . . " *Ibid.* (quoting from *McGary v. President & Council of the City of Lafayette,* 12 Rob. 668, 677 [(La. 1846]).

To let the *Cornwell-Trevino* rule stand would fly in the face of this Court's reasoning and holding in *City of Newport*.

January 1, 1997

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHANNA TREVINO,

Plaintiff-Appellant,

v.

DARYL GATES; TOM BRADLEY; TOM RI[illegible]DIN; ROGER MURDOCK; ED DAVIS; HERBERT BOECKMANN; JAMES FISK; STEPHEN GAVIN; MAXWELL GREENBERG; ELBERT HUDSON; MARGUERITE JUSTICE; EMMETT MCGAUGHEY; SALVADOR MONTENEGRO; BARBARA SCHLEI; ROBERT TALCOTT; REVA TOOLEY; ROBERT WEIL; SAMUEL WILLIAMS; STEPHEN YSLAS; LAPD OFFICERS; JERRY BROOKS; JOSEPH CALLIAN; WARREN SIRK; RICHARD SPELLMAN; GARY STRICKLAND; JAMES TIPPINGS; RICHARD ZIERENBERG; MANUEL AVILA; CHARLES BENNETT; BRIAN DAVIS; JOHN FRUGE; JOSEPH FREIA; E.T. GUIZA; PETER SANCHEZ; REGINALD WEAVER; JAMES TOMA; C.S. WINSTON; PHILIP WIXON; GARY ZERBEY; JOEL WACHS; JOY PICUS; JOHN FERRARO; ZEV YAROSLAVSKY; RUTH GALANTER; ERNANI BERNARDI; NATE HOLDEN; MARVIN BRAUDE; HAL BERNSON; MICHAEL WOO; JOAN FLORES;

No. 95-55290

D.C. No.
CV-92-01981-JSL

OPINION

ONE HUNDRED UNKNOWN NAMED EMPLOYEES OR OFFICIALS OF THE CITY OF LOS ANGELES, all in both their individual and official capacities; CITY OF LOS ANGELES,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
August 6, 1996 – Pasadena, California

Filed November 1, 1996

Before: Dorothy W. Nelson, Thomas G. Nelson, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiff-appellant.

Katherine J. Hamilton, Assistant City Attorney, Los Angeles, California; Louis R. Miller and Jonathan H. Anschell, Christensen, White, Miller, Fink & Jacobs, Los Angeles, California, for the defendants-appellees.

OPINION

THOMAS, Circuit Judge:

Plaintiff Johanna Trevino is the daughter of Juan Bahena, one of three men killed by Los Angeles Police

Department ("LAPD") officers during a robbery. Among other claims, Trevino alleged that the City of Los Angeles ("City") and members of the Los Angeles City Council ("Councilmembers") deprived her of her civil rights in violation of 42 U.S.C. § 1983 by indemnifying LAPD officers against punitive damage liability in excessive force cases. Trevino appeals the district court's entry of summary judgment for the Councilmembers and the City, along with numerous other issues. We affirm all of the district court's rulings, with the exception of the attorneys' fees award.

BACKGROUND

Juan Bahena was fatally shot by LAPD officers shortly after he and three accomplices robbed a McDonald's restaurant on February 12, 1990. While leaving the scene, Bahena and the other perpetrators were surrounded by police officers. Believing the burglars to be pointing guns in their direction, the officers opened fire, killing three of the four suspects. None of the perpetrators were bearing actual firearms, only pellet guns.

Trevino's grandmother and survivors of the other victims sued the officers involved, the police chief and the City of Los Angeles for violations of 42 U.S.C. § 1983 based on the use of excessive force. *Gomez v. Gates*, 804 F. Supp. 69 (C.D. Cal. 1992). Trevino was not a party to the lawsuit. The *Gomez* jury found the police chief and the officers involved liable, awarded nominal compensatory damages of $1 and a total of $44,000 in punitive damages in varying amounts against the LAPD officers. After deliberating for two days, the City Council voted to pay

the punitive damage award pursuant to Cal. Gov. Code § 825(b).

Trevino then filed a lawsuit against the officers involved, the Councilmembers and the City under 42 U.S.C. § 1983. She sued the officers on substantially the same theories her grandmother asserted in *Gomez* represented by the same lawyer as her grandmother had been. Trevino also sued the City and Councilmembers on the theory that punitive damage indemnification encouraged excessive force and caused a deprivation of her constitutional rights. Alternatively, she claimed the Council's decision to pay the *Gomez* punitive damage award was an unconstitutional ratification of LAPD's excessive force.

In 1993, the district court held Trevino was collaterally estopped from relitigating punitive damage liability because the *Gomez* verdict had already determined the issue. The district court limited punitive damages to $9,109, the highest amount awarded to any plaintiff in *Gomez*. The defendant officers stipulated to a total punitive damages award of $9,109. The only remaining issue to be litigated against the officers was the compensatory damages due to Trevino.

After two mistrials, trial was reset for December 6, 1994. The district court granted summary judgment to the City and the Councilmembers. At trial, the jury awarded Trevino only nominal damages against the officers. The district court entered judgment in the amount of $1 plus $9,109 in stipulated punitive damages. Trevino moved for attorney's fees in the amount of $495,885 under 42 U.S.C. § 1988. The district court awarded $25,000.

SUMMARY JUDGMENT FOR COUNCILMEMBERS BASED ON QUALIFIED IMMUNITY

Trevino contends that the district court erred in granting summary judgment for the Councilmembers on the grounds of qualified immunity. We review the court's grant of qualified immunity and summary judgment de novo. *Neely v. Feinstein*, 50 F.3d 1502, 1507 (9th Cir. 1995); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *cert. denied* ___ U.S. ___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). Qualified immunity is an immunity from suit. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872 (9th Cir. 1993). Public officials sued under 42 U.S.C. § 1983 are entitled to qualified immunity if:

> (1) the "right" they allegedly violated was not "clearly established" at the time of the violation, or
>
> (2) if a reasonable [official] would have thought that the defendants' actions were constitutional.

Palmer v. Sanderson, 9 F.3d 1433, 1435 (9th Cir. 1993) (citations omitted); *see also Neely*, 50 F.3d at 1507. The plaintiff has the burden of proving that the right allegedly violated was clearly established. *Id.* at 1509. If the plaintiff meets this burden, then the defendant must prove that his conduct was "reasonable even though it might have violated the law." *Id.* "The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court." *Act Up!*, 988 F.2d at 873.

Trevino has alleged that the Councilmembers, by engaging in a policy of routinely voting to pay punitive

damages, violated Trevino's constitutional rights by promoting and ratifying the use of excessive force by the LAPD. Although this issue is contested, we will assume for purposes of this analysis only that the City Council actions constituted a custom or policy of indemnifying officers for punitive damage awards.

Under the first part of the qualified immunity test, Trevino must demonstrate that the policy violated clearly established law.

> To be clearly established, the law must be sufficiently clear that a *reasonable official would understand that what he is doing violates that right.* It is not necessary that the alleged act have been previously declared unconstitutional, as long as the unlawfulness was apparent in light of preexisting law.

Newell v. Sauser, 79 F.3d 115, 117 (9th Cir. 1996) (citation and internal quotations omitted, emphasis added). To determine whether law is clearly established, we "survey the legal landscape" and examine those cases that are "most like" the instant case. *Figueroa v. United States,* 7 F.3d 1405, 1409 (9th Cir. 1993), *cert. denied* ___ U.S. ___, 114 S. Ct. 1537, 128 L. Ed. 2d 190 (1994). "In the absence of binding precedent, we look to all available decisional law." *Id.* (citations and internal quotations omitted).

A survey of the legal landscape demonstrates that the law is not sufficiently clear that a reasonable Councilmember would understand that payment of punitive damages violates any constitutional right either now or prior to the fatal shooting.

First, a municipality's payment of punitive damages under Cal. Govt. Code § 825(b) does not violate federal law.[1] *Cornwell v. City of Riverside*, 896 F.2d 398, 399 (9th Cir.), *cert. denied*, 497 U.S. 1026, 110 S. Ct. 3274, 111 L. Ed. 2d 784 (1990). Indeed, as the court noted in *Cornwell*, a municipality's payment of punitive damages may have the salutary purpose of assuring that civil rights plaintiffs can collect their judgments. *Id.* at 400.

Second, cases from other jurisdictions have held that a punitive damages indemnification policy could not cause a constitutional deprivation. *Ekergren v. City of Chicago*, 538 F. Supp. 770, 772-773 (N.D. Ill. 1982); *Brown v. City of Chicago*, 573 F. Supp. 1375, 1379 (N.D. Ill. 1983).

Third, under California law, indemnification is discretionary, subject to certain restrictions. Cal. Gov. Code § 825(b). In making its indemnification decision, the municipality uses its own independent judgment as to the underlying facts. "That the city reaches a different result as to the good faith of the officers than a federal jury is not decisive: the city is not bound by the jury's findings when it makes its decision to indemnify." *Cornwell* 896 F.2d at 399.

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[1] Under Cal. Gov. Code § 825(b) a public entity, "acting in its sole discretion," may pay punitive damages awarded against a public employee if: (i) the employee was acting within the course and scope of employment during the incident in question, (ii) the employee acted "in good faith, without actual malice and in the apparent best interests of the public entity," and (iii) payment of the punitive damages "would be in the best interest of the public entity."

Thus, far from being "clearly established law," a policy of indemnifying punitive damage awards has never been judicially determined as violating constitutional rights by encouraging police officers to use excessive force. In fact, *Cornwell* indicates that indemnification is discretionary and *Ekergren* casts serious doubt on whether an indemnification policy may legally cause the use of excessive force. Such a policy is not sufficiently similar to other actions that have been held unconstitutional to put reasonable Councilmembers on notice that their actions could possibly violate constitutional rights. *See Chew v. Gates*, 27 F.3d 1432, 1449-50 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1097, 130 L. Ed. 2d 1065 (1995).

Therefore, we conclude that the law is not clearly established that a policy of indemnifying punitive damage awards violates constitutional rights, either now or prior to the robbery. A city council does not violate section 1983 if it indemnifies officers against punitive damage awards on a discretionary, case by case basis, and complies in good faith with the requirements of Cal. Gov. Code § 825(b).

Because Trevino failed to demonstrate that the Councilmembers' conduct violated a clearly established constitutional right, we need not address the second prong of the qualified immunity test. We affirm summary judgment for the Councilmembers. *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990).

SUMMARY JUDGMENT FOR THE CITY ON THE MERITS

Trevino alleges that the district court also erred in granting summary judgment to the City on the merits. Even though the Councilmembers are entitled to qualified immunity, the City may still be subject to municipal liability for causing a constitutional violation under 42 U.S.C. § 1983. *Owen v. City of Independence*, 445 U.S. 622, 651-652, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). As a prerequisite to establishing Section 1983 municipal liability, the plaintiff must satisfy one of three conditions:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy. Whether a particular official has final policy-making authority is a question of state law. Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

Gillette v. Delmore, 979 F.2d 1342, 1346-1347 (9th Cir. 1992) (citations and internal quotations omitted), *cert. denied*, 510 U.S. 932, 114 S. Ct. 345, 126 L. Ed. 2d 310 (1993).

After proving that one of the three circumstances existed, a plaintiff must also show that the circumstance

was (1) the cause in fact and (2) the proximate cause of the constitutional deprivation. *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 266-68, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) (discussing causation requirement in section 1983 municipal liability cases).

a. *Violation by policy or custom*

Prior to the robbery, the City had not adopted a formal policy of indemnifying individual police officers for punitive damage judgments. On the contrary, the City considers each case individually on its merits pursuant to Cal. Govt. Code § 825(b). As we have noted, this practice is not facially unconstitutional. *Cornwell*, 896 F.2d at 399.

Absent a formal governmental policy, Trevino must show a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity." *Gillette*, 979 F.2d at 1346-47. The custom must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Monell v. Dept. of Soc. Serv. of N.Y.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy. *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984). *See also: Meehan v. Los Angeles County*, 856 F.2d 102 (9th Cir. 1988) (two incidents not sufficient to establish custom); *Davis v.*

Ellensburg, 869 F.2d 1230 (9th Cir. 1989) (manner of one arrest insufficient to establish policy).[2]

The City contends that no indemnification custom exists and, in fact, that prior to the fatal shooting the City Council had never voted to pay a punitive damage award against an individual officer. Trevino argues that by voting to settle some civil rights cases and posting appeal bonds in others, the City indirectly engaged in a custom or policy of indemnifying punitive damage awards.

As of January 30, 1995, the Councilmembers voted that the City pay punitive damages in approximately eleven or twelve police-related lawsuits filed since 1985, when Cal. Gov. Code § 825(b) was enacted. The Councilmembers submitted unrebutted evidence that their votes to pay punitive damages occurred after assuring compliance with Cal. Govt. Code § 825(b) and upon advice of the City Attorney. More importantly, the Councilmembers did not vote that the City should pay punitive damages in *any* police case prior to February 12, 1990, the date the McDonald's robbery occurred. From 1985 to the date the district court granted summary judgment, the Council voted against the payment of punitive damages in two police-related lawsuits.

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[2] Liability based on custom is different from liability based on ratification or delegation where a single incident causally related to the constitutional deprivation may be sufficient for liability to attach. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

Only those police officers who are represented in litigation by the City Attorney are eligible to have punitive damages awards paid by the City. Cal. Gov. Code § 995 *et seq.* provides that municipal employees are entitled to legal representation at City expense if they are sued for acts that (i) occurred within the course and scope of employment, and (ii) did not involve actual malice, fraud or corruption. Under this standard, LAPD officers have been denied representation in at least twenty lawsuits, some of which occurred prior to February 12, 1990. Officers denied representation for acting with malice or beyond the scope of employment must pay their own legal fees and punitive damages.

The City has also settled police-related lawsuits after a jury verdict awarding punitive damages and prior to appeal. The record establishes that the purpose of settling such cases is to minimize the cost to the City's treasury and taxpayers. Settlements are recommended by the City Attorney and approved by the City Council when it is apparent that the costs of appeal and further litigation, exposure for attorneys' fees and costs, and the potential for an increased damage award in the event of a retrial make it likely that the ultimate cost to the City's treasury will exceed the settlement figure. From January 1985 through October 1994, the City settled approximately seventeen or eighteen lawsuits after a verdict.

There is no genuine issue of material fact concerning cases in which action was taken by the Councilmembers prior to February 12, 1990, the date Bahena was killed. There were nine excessive forces cases in which punitive damages were awarded that the Council voted to settle

prior to February 12, 1990.[3] The plaintiff waived payment of punitive damages in four of the nine settled cases. In two additional cases, the Councilmembers did not vote to settle until after February 12, 1990, but prior to that date the Councilmembers voted to post a bond on the judgment for compensatory and punitive damages pending appeal. The bond was posted based upon the advice of the City Attorney. Nothing in the record indicates that the bond was ever executed.

Viewing plaintiff's evidence in the light most favorable to her, the undisputed evidence falls far short of establishing a "persistent and widespread" practice such that it constitutes "permanent and well settled" city policy. The record is virtually devoid of any direct evidence of council indemnification prior to the shooting. The record as to the indirect claims reveals a varied and inconsistent *ad hoc* practice of resolving excessive force cases prior to the incident in question. If there is a pattern, it is more reflective of normal municipal claims adjusting with all its inconsistencies and imperfections than of subtle conspiracy to indemnify officers outside

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[3] The City submitted a chart detailing cases from 1979 to 1994 involving punitive damages. Trevino alleges that the first eighteen cases pre-date the incident. However, she is mistaken because the date on the chart is not the date of settlement, payment or bonding of punitive damages. Three of the eighteen cases were settled, paid or bonded after February 12, 1990. In two of the eighteen, the City did not pay, settle or bond punitive damages. One of the cases is not an excessive force case and one case had a result which was unknown to the City. Of the eleven remaining cases, the City voted to post bond in two and voted to settle nine prior to February 12, 1990. In four of the settled cases, punitive damages were waived as part of the settlement.

the public eye. When one must resort to inference, conjecture and speculation to explain events, the challenged practice is not of sufficient duration, frequency and consistency to constitute an actionable policy or custom.

Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate. The moving party on a motion for summary judgment bears the "initial responsibility of informing the district court of the basis for its motion. . . . " *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The defendants met their initial burden. The burden then shifts to the nonmoving party to provide evidence sufficient to establish that there is a genuine issue of material fact as to each element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-325. Trevino failed to meet her burden of rejoinder and the City is entitled to judgment as a matter of law.

Because we find as a matter of law that Trevino has failed to establish a "custom or policy," we need not analyze whether the alleged policy or custom was the cause in fact and the proximate cause of the constitutional deprivation.

b. *Action by a person with final policy-making authority.*

The second circumstance under which a municipality may incur section 1983 liability is when the individual who committed the constitutional tort was an official

with "final policy-making authority" and that the challenged action itself thus constituted an act of official government policy. *Gillette*, 979 F.2d at 1346. As to matters of police policy, the chief of police under some circumstances may be considered the person possessing final policy-making authority. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). The police officers who shot Bahena were not "officials with final policy-making authority" and they were not ordered to shoot by the police chief, the City Council or anyone else possessing final policy-making authority. Thus, the City is not liable under this theory.

c. *Ratification*

Trevino argues that by voting to pay the *Gomez* punitive damage awards, the City ratified the officers' conduct. *Gillette's* ratification test is satisfied if a plaintiff can "prove that an official with final policy-making authority ratified a subordinate's decision or action and the basis for it." *Gillette*, 979 F.2d at 1346-1347; *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988).

We have found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation. *See, e.g., Hammond v. County of Madera*, 859 F.2d 797, 802-803 (9th Cir. 1988) (board, which was responsible for approving transfers of rights-of-way, accepted and approved of transfer documents that resulted in deprivation of constitutional rights); *Larez v. City of Los Angeles*, 946 F.2d 630, 645-648 (9th Cir. 1991)

(individual filed a complaint with the LAPD alleging excessive force was used against him in a search, LAPD investigated it, and the police chief signed a letter stating that none of the complaints would be sustained, thereby ratifying the investigation and search); *Fuller v. City of Oakland*, 47 F.3d 1522, 1526 (9th Cir. 1995) (an officer investigated complaints of sexual harassment, and police chief who approved investigator's report and conclusion that there was no harassment ratified the investigator's conclusion).

By contrast, the City Council in this case was not deciding whether to approve the officers' conduct; it was debating whether or not to compensate victims of the constitutional deprivation. The City Council deliberated for two days, considering many points of view. In the end, it found that payment of punitive damages "would be in the best interest" of the City. Thus, under these circumstances, the Councilmembers' vote to pay punitive damages does not amount to ratification.

Were we to find ratification, our holding would fly in the face of *Cornwell* by indirectly finding that a municipality's payment of punitive damages under Cal. Govt. Code § 825(b) violates federal law. *Cornwell*, 896 F.2d at 399. Further, such a holding would deter any municipality from choosing to pay victims of constitutional violations, thus thwarting the very purpose of section 1983.

Because we find no ratification, we need not discuss whether the alleged ratification was the cause in fact and proximate cause of the constitutional deprivation.

d. *Conclusion*

Therefore, because there is no genuine issue of material fact as to whether Trevino can establish any of the three *Gillette* theories, the district court correctly granted the City summary judgment.

DISCOVERY ISSUES

Trevino argues that she was denied discovery. Specifically, Trevino argues she should have been afforded the opportunity pursuant to Rule 56(f) to receive the tape-recordings of closed-session Councilmember deliberations regarding votes to pay punitive damages and to depose the Councilmembers and members of the City Attorney's staff as to each specific instance in which punitive damages were discussed.

We review a denial of a Rule 56(f) motion for abuse of discretion. *Maljack Prods, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 887 (9th Cir. 1996). The district court did not abuse its discretion because, among other reasons: (1) Trevino failed to identify the disputed issues in her Rule 56(f) motion; (2) Trevino's counsel was in fact afforded the opportunity to listen to the recordings;[4] and (3) Trevino did not timely challenge the Magistrate

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[4] Trevino argues that the City was required to produce copies of the recordings, but she never raised this argument before the district court in the form of a motion to compel. Also, a party who produces documents for inspection is not required to make copies for the other party. *See* 8A Charles A. Wright *et al., Federal Practice and Procedure* § 2213 (1994).

Judge's order staying the depositions as required by Rule 72(a), F.R.Civ.P.[5]

FAILURE TO GIVE JURY INSTRUCTION ON PRESUMED DAMAGES

Trevino argues that the district court erred when it refused to instruct the jury that presumed damages may be recovered by a section 1983 plaintiff. The jury instructions stated that compensatory damages may be awarded upon proof of actual injury, and in the absence of such proof, nominal damages for violation of a constitutional right are appropriate. When a party claims that the trial court's jury instruction misstated the elements that must be proved at trial, we review the instruction de novo. *Gizoni v. Southwest Marine Inc.*, 56 F.3d 1138, 1142 (9th Cir.), *cert. denied* ___ U.S. ___, 116 S. Ct. 381, 133 L. Ed. 2d 304 (1995).

Damages are not presumed to flow from every constitutional violation. *Carey v. Piphus*, 435 U.S. 247, 263, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). Presumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages. *Id.* at

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[5] Rule 72(a) states that a party must file objections to a Magistrate Judge's order within 10 days, and "a party may not thereafter assign as error a defect in the magistrate judge's order to which object was not timely made." The record reveals that Trevino never appealed the Magistrate Judge's order to the district court. Trevino does not dispute this fact in her appellate briefs. Trevino's failure to comply with Rule 72(a) precludes her from challenging the Magistrate Judge's order on appeal. *Palmer v. United States*, 794 F.2d 534, 540 (9th Cir. 1986); *McKeever v. Block*, 932 F.2d 795, 799 (9th Cir. 1991).

264. A presumed damage instruction is not required when, as in this case, "the jury was fully authorized to compensate respondent for both monetary and nonmonetary harms caused by petitioners' conduct." *Memphis Community School District v. Stachura*, 477 U.S. 299, 312, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986). Here, Trevino ably presented evidence and argued to the jury she was entitled to compensatory damages for emotional and economic harm. The case was submitted to the jury on Trevino's compensatory damage theory. Under these circumstances, a presumed damages instruction was not mandated.

If the jury fails to find actual injury, nominal damage awards for constitutional violations are appropriate. *See George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992) (nominal damages instruction is appropriate in § 1983 case against police officers alleging warrantless arrest when no actual damages are proved), *cert. denied* 507 U.S. 915, 113 S. Ct. 1269, 122 L. Ed. 2d 664 (1993); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986).

Accordingly, the district court did not err in refusing to instruct the jury on the availability of presumed damages.

TESTIMONY EXCLUSION

Trevino claims the district court erred by excluding her own testimony and that of her economic damage experts.

The district court precluded Trevino's own testimony under Fed. R. Evid. 403, finding its probative value was

outweighed by its prejudicial effect. The district court has considerable latitude in performing a Rule 403 balancing test and we will uphold its decision absent clear abuse of discretion. *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991). The fact that a party can present the relevant testimony through other witnesses is a factor that weighs in favor of exclusion of the prejudicial testimony. *Id.*

The district court did not abuse its discretion in refusing to allow Trevino to testify. Trevino would have testified regarding the emotional distress she suffered due to the loss of her father. Trevino was not yet born when her father was killed, and she was only five years old at the time of the trial. The district court thus concluded that there was little probative value to Trevino's testimony because she could not meaningfully testify as to the distress she had suffered in the past or would suffer in the future. Trevino's counsel intended to question her on her "impression of what happened to her father . . . and how she thinks her father died." The district court concluded that any probative value of Trevino's testimony was outweighed by the clear prejudicial effect of having a highly sympathetic child testify who knew nothing about the circumstances of her father's death. More importantly, Trevino was given the opportunity to introduce evidence of her emotional distress through a psychiatrist who had examined her. Although we disfavor exclusion of a plaintiff's own testimony, we find under these circumstances, the district court did not abuse its discretion in refusing to allow Trevino to testify.

Trevino also appeals the district court's exclusion of expert testimony for lack of foundation. "The trial court

has broad discretion in admitting and excluding expert testimony, and the court's action will be sustained unless it is manifestly erroneous." *LuMetta v. United States Robotics, Inc.*, 824 F.2d 768, 771 (9th Cir. 1987) (internal quotations omitted). "[W]here foundational facts demonstrating relevancy . . . are not sufficiently established, exclusion of proffered expert testimony is justified." *Id.*

Two experts were excluded: an economist to project Bahena's future income and a domestic relations lawyer to opine how much of the future income stream Bahena could have been required to pay Trevino's mother as child support. Both opinions were predicated on the assumption that Bahena was employed as a full time mechanic when he was killed. The only foundation laid for this assumption was testimony that (1) Bahena left in the morning and returned in the evening; (2) he gave Trevino's mother money at fairly regular intervals and (3) he was observed on a few occasions working on cars. There were no pay stubs, no W-2s, no tax returns, no cancelled checks, and no employer testimony offered as foundational evidence. Given the state of the record, it was not manifestly erroneous for the district court to exclude the expert testimony for lack of foundation. *See Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2nd Cir. 1984) (vague assurances about future support are not an adequate foundation for expert testimony on future income).

COLLATERAL ESTOPPEL

Trevino claims she should be entitled to relitigate the *Gomez* punitive damage award, which she contends was

grossly inadequate. The district court reasoned that the interests of Trevino and her grandmother were identical with regard to punitive damages and held that *Gomez* punitive damage verdict collaterally estopped relitigation of the issue in this case.

"Whether collateral estoppel is available is a mixed question of law and fact subject to de novo review." *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993). Federal law governs the collateral estoppel effect of a case decided by a federal court. *Fireman's Fund Ins. Co. v. International Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985). To foreclose relitigation of an issue under federal law:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Town of North Bonneville, 10 F.3d at 1508 (citations omitted). Trevino contends that the first two elements have not been met.

The issue of the amount of punitive damages to be awarded to Trevino is identical to the issue of punitive damages in *Gomez*. We have precluded the litigation of punitive damages for conduct which was the subject of punitive damages in a prior action. *Bates v. Union Oil Company of California*, 944 F.2d 647, 649-651 (9th Cir. 1991); *cert. denied*, 503 U.S. 1005, 112 S. Ct. 1761, 118 L. Ed. 2d 424 (1992). The Supreme Court has held that "the amount

of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Punitive damage awards are founded on the defendants' conduct. The wrongful conduct of defendants to be deterred is identical in both *Gomez* and this case: the use of excessive force.

Trevino argues, however, that the wrongful conduct to be deterred is the deprivation of Trevino's constitutional liberty interest in her relationship with her father. In contrast, Trevino's grandmother was deprived of her constitutional liberty interest in her relationship with her son. Trevino contends that her liberty interest in her relationship with her father is thus distinct from her grandmother's liberty interest.

We recognize that "a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir.), *cert. denied* 484 U.S. 935, 108 S. Ct. 311, 98 L. Ed. 2d 269 (1987); *see also Crumpton v. Gates*, 947 F.2d 1418, 1424 (9th Cir. 1991). Nonetheless, Trevino's argument fails. The violation of Trevino's liberty interest in her relationship with her father bears on the harm suffered by Trevino, rather than the conduct to be deterred. The violation of Trevino's liberty interest is therefore addressed through compensatory damages rather than punitive damages. Accordingly, the issue of the amount of punitive damages to be awarded against the officers for use of excessive force is identical in both *Gomez* and in this case.

The second element of collateral estoppel is that the issue must have been actually litigated by the party against whom estoppel is asserted. Although Trevino was not a party in *Gomez*, a "person technically not a party to the prior action may be bound by the prior decision if his interests are so similar to a party's that that party was his virtual representative in the prior action." *United States v. Geophysical Corporation of Alaska*, 732 F.2d 693, 697 (9th Cir. 1984) (internal quotations omitted); *see also Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 418, 133 L. Ed. 2d 336 (1995). Sufficient similarity of interests to justify the application of collateral estoppel has been found in a variety of cases. *See, e.g., In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (similarity of interests found between a close corporation and its sole or controlling stockholder); *Shaw*, 56 F.3d at 1131-1132 (juror was collaterally estopped from litigating issue of discriminatory use of peremptory challenges; juror's interests were virtually represented by plaintiff in prior proceeding who objected to the discriminatory use of such challenges). "Although a familial relationship need not, in and of itself, confer privity status, it does constitute an important factor when assessing the preclusive effects of a prior adjudication." *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988).

The interests of Trevino's grandmother in *Gomez* and the interests of Trevino in this case are identical with regard to the punitive damages to be awarded against the officers for the use of excessive force against Trevino's father. Trevino's grandmother had tremendous incentive in *Gomez* to see the officers severely punished for their actions. Trevino has the same goal in this action. Thus,

the interests of Trevino and her grandmother are so similar that Trevino's grandmother virtually represented Trevino in *Gomez*. *See Geophysical*, 732 F.2d at 697. Although a familial relationship does not necessarily confer privity status, the relationship between Trevino and her grandmother is sufficient in this case. *See Jaffree*, 837 F.2d at 1467.

Accordingly, all of the elements of collateral estoppel are satisfied, and the district court did not err.

ATTORNEYS' FEES

At the conclusion of the case, Trevino moved for attorneys' fees pursuant to 42 U.S.C. § 1988 in the amount of $495,885. The district court found that Trevino was entitled to recover reasonable attorneys' fees under § 1988. The district court calculated the fee by determining a reasonable hourly rate. Trevino's counsel submitted evidence that the reasonable hourly rate in the community for experienced private attorneys handling complex litigation ranged from $250 to $550/hour. However, the district court noted that the City had submitted evidence in *Gomez*, 804 F. Supp. 69, that the City pays private attorneys that it hires to defend excessive force cases $175/hour maximum, $125 to $135/hour for attorneys with partner status and experience, and $90 to $125/hour for associates. Relying on these defense rates, the district court held that $135/hour for lead counsel and $100/hour for associate counsel was reasonable in this case because it involved mostly simple issues. The district court awarded $25,000 in fees. On appeal, Trevino argues

that the district court erred in using defense attorney rates in choosing an appropriate hourly rate.

We review an attorney's fees award pursuant to 42 U.S.C. § 1988 for abuse of discretion. *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991). "As such, the district court's fee award will be overturned if it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Id.*

Under Section 1988, the reasonable hourly rate is determined by "considering the experience, skill and reputation of the attorney requesting fees." *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 908 (9th Cir. 1995) (citations and internal quotations omitted). This determination "should be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Id.* (citations and internal quotations omitted). In setting a reasonable hourly rate, a district court may consider the factors developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), which we approved in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied* 425 U.S. 951, 96 S. Ct. 1726, 48 L. Ed. 2d 195. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992), *vacated on other grounds* 984 F.2d 345 (1993); *see also McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1994). The *Johnson-Kerr* factors "include the novelty and difficulty of the issues involved in a case, [and] the skill required to litigate those issues. . . . " *Davis*, 976 F.2d at 1546.

The district court did not abuse its discretion in reducing the rate requested by Trevino because many of

the issues were not complex. An individual attorney need not be awarded the same hourly rate in all Section 1983 cases because not all such cases are equally complex. Here, the only issue that was tried was the compensatory damages due to Trevino, which the district court appropriately characterized as "the equivalent of a lawsuit over compensatory damages in a state wrongful death case." Trevino's attorney had already conducted a full trial on the same issue with respect to other parties in *Gomez*. The liability of the police officers was already determined in *Gomez*. The case was tried three times before a jury. The district court did not err in concluding that these issues were not complex. In addition, the district court correctly recognized that some issues, such as collateral estoppel and qualified and absolute immunity, were complex. The district court's opinion on these points is well-reasoned.

However, the district court should not have relied on the rates paid by the City to private attorneys for defending excessive force cases as a starting point for the reasonable hourly rate. In determining the reasonable hourly rate, the court should be guided by "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Schwarz*, 73 F.3d at 908. "As the Supreme Court made clear in *Blum* . . . the proper reference point in determining an appropriate fee award is the rates charged by private attorneys in the same legal market as prevailing counsel. . . . " *Davis*, 976 F.2d at 1547 (citing *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)). Private attorneys hired by a government entity to defend excessive force cases are not in the same legal market as private plaintiff's attorneys who litigate civil rights cases.

In addition, attorneys hired by a government entity to defend excessive force cases are not acting as "private" attorneys at all.

The Eleventh Circuit ruled on this issue in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869-870 (11th Cir. 1993). In *Brooks*, when setting a reasonable hourly rate for the plaintiff's attorney, the district court relied on the rate charged by a private attorney hired by the state to defend the case. The *Brooks* court stated:

> We have recognized in the past that private attorneys often charge lower rates to the government because of counterbalancing benefits such as repeat business, and [w]here the facts show this, the fee charged by a government attorney is simply irrelevant to the establishment of a reasonable hourly rate for a plaintiff's civil rights lawyer.

Id. at 869 (citations and internal quotations omitted). The Eleventh Circuit held that "it was clear error for the district court panel to rely so heavily on the rate paid to opposing counsel. We remand the case to it so that the hourly rate can be fixed free of this error." *Id.* at 870.

We agree with the Eleventh Circuit. Here, the rates charged by private attorneys to defend excessive force cases on behalf of the City were significantly lower than the evidence submitted by Trevino regarding prevailing rates in the community for private attorneys in the same legal market as Trevino's attorney. Of course, we are mindful that the district court used the defense rates in *Gomez* without any complaint by Trevino's counsel. In fact, we do not necessarily disagree with the final result reached by the district court and this decision does not

preclude the district court from reaching the same decision after consideration of different hourly rates. Nonetheless, we remand this issue for reanalysis in light of our adoption of *Brooks*.

ATTORNEYS' FEES AND COSTS ON APPEAL

A plaintiff is entitled to attorneys' fees under § 1988 when:

> (1) it wins on the merits of its claim, (2) the relief it receives materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) the relief directly benefits the plaintiff.

Martinez v. Wilson, 32 F.3d 1415, 1422 (9th Cir. 1994). "When a party meets with partial success on appeal, we have deemed it proper to award fees only for those claims successfully defended on the merits." *Larez*, 946 F.2d at 649. Trevino was successful only on the issue of attorneys' fees. However, Trevino will receive a direct benefit only if the attorneys' fee award is increased on remand. Thus, whether Trevino is entitled to fees with respect to her appeal regarding attorneys' fees cannot be determined until after remand. In the event the district court increases the amount of attorneys' fees awarded to Trevino, the district court is directed to set and award a reasonable attorneys' fee for Trevino's appellate efforts relating to the attorneys' fee issue. The parties shall each bear their own costs of appeal.

CONCLUSION

The district court's decisions concerning summary judgment, discovery issues, testimony exclusion and presumed damages are affirmed. The district court's judgment as to attorneys' fees is vacated for reanalysis consistent with this opinion. AFFIRMED in part, VACATED in part, and REMANDED. No costs allowed.